Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

WENDY J. AHRENS,
Petitioner,

v.

PEROT SYSTEMS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit erred in judicially estopping Ahrens from pursuing her sex and disability discrimination claims because of Ahrens' testimony in a previous lawsuit that she was terminated because of the tortious interference of third parties.

LIST OF PARTIES AND RULE 29.6 LIST

The parties before the Court of Appeals and this Court are listed in the caption. To Petitioner's knowledge, Perot Systems Corporation has no parent companies or non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Wendy J. Ahrens prays for a writ of certiorari to review the opinion and order of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on March 3, 2000.

OPINIONS BELOW

The opinion of the Union States Court of Appeals for the Fifth Circuit is published at 205 F.3d 831 (5th Cir. 2000), and a copy is contained in the Appendix attached hereto. The opinion of the United States District Court is published at 39 F.Supp.2d 773 (N.D. Tex. 1999), and a copy is contained in the Appendix attached hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendering judgment. The decision for which review is sought was entered on March 3, 2000. Pursuant to this Court's Rule 13.1, this petition for writ of certiorari is timely because it is being filed within ninety days after entry of judgment.

STATUTES INVOLVED

Relevant portions of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e, *et seq*. and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq*., are set forth below.

42 U.S.C. § 2000e-2(a)

> It shall be an unlawful employment practice for an employer - -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 12112

(a) **General Rule**.- - No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) **Construction**. - - As used in subsection (a), the term "discriminate" includes - -

1. Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

This case involves claims of sex discrimination and disability discrimination arising from Ms. Ahrens' termination by Perot Systems Corporation. After exhausting her administrative prerequisites, Ms. Ahrens filed her initial Complaint alleging sex discrimination on July 22, 1996 and filed her First Amended Complaint alleging sex and disability discrimination on November 6, 1996. Perot Systems filed a Motion for Summary Judgment on July 24, 1998, which was granted by the district court on February 3, 1999. Ahrens appealed the district court's Order to the United States Court of Appeals for the Fifth Circuit, and following oral argument, a three-judge panel of the Fifth Circuit affirmed the judgment of the district court.

The district court had jurisdiction over Ahrens' claims under 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. § 2000e-5 and 42 U.S.C. § 12117(a).

B. Factual Background

Ahrens was originally hired by Perot Systems on September 22, 1992 as a salesperson in its Commercial Insurance Division. In approximately November, 1994, Ahrens took a medical leave of absence to have a hysterectomy and shoulder surgery. When Ahrens returned from her medical leave of absence in approximately March, 1995, she was assigned to work in a sales support position in Dallas. In November, 1995, Ahrens' supervisor told her that her role might change and suggested that Ahrens begin looking for other positions within the company. Ahrens was terminated on December 1, 1995.

Coincidentally, on the same day she was terminated, Ahrens filed a lawsuit against several defendants who are not parties to this suit.[1] Included in Ahrens' claims in the first lawsuit was a tortious interference claim, in which Ahrens alleged that certain defendants in that suit had tortiously interfered with Ahrens' employment relationship with Perot Systems.

After Ahrens' termination, and after the first lawsuit had already been filed, Richard Mordhorst, a Perot Systems manager and one of Ahrens' former supervisors, told Ahrens that she was terminated because she was a woman and because she was perceived as "damaged goods." Also after her termination, and after the first lawsuit had already been filed, Mordhorst told Ahrens that if she had been a man, she would not have been terminated because Perot Systems would have found a position for her within the company instead of firing her. Finally, after Ahrens' termination, and after the first lawsuit had already been filed, Mordhorst told Ahrens' husband that the amount of medical leave Ahrens had taken "did not help" her employment situation.

Following these statements by Mordhorst, Ahrens filed two timely charges of discrimination with the EEOC against Perot Systems. Ahrens filed her first charge of discrimination on approximately April 11, 1996, alleging sex discrimination. She received a notice of right to sue letter on that charge shortly after May 3, 1996. Ahrens filed a second charge of discrimination on approximately July 12, 1996, alleging disability dis-

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[1] For ease of reference, the lawsuit that Ahrens filed on December 1, 1995 will be referred to as the "first lawsuit."

crimination. Ahrens received a notice of right to sue letter on that charge shortly after August 28, 1996. Ahrens filed her original Complaint in this suit on July 22, 1996 alleging sex discrimination and filed a First Amended Complaint on November 6, 1996, alleging both sex discrimination and disability discrimination.

In October, 1996, Ahrens was deposed in the first lawsuit. During that deposition, Ahrens testified that she was terminated from Perot Systems because Evan Chesler (one of the defendants) tortiously interfered with her employment contract. During that deposition, Ahrens was not asked if she believed there were any other reasons for her termination. Later in the first lawsuit, two of the three defendants were dismissed because of lack of personal jurisdiction. Following that dismissal, Ahrens voluntarily non-suited her claims against one of the other defendants, and she no longer pursued her tortious interference claims.

In July, 1998, during her deposition in this case, Ahrens testified that she was terminated from Perot Systems "because of [her] sex: female; that women weren't given the opportunity to be successful at Perot Systems that men would be; and that - - because of the fact that [she] was considered damaged goods or handicapped and unable to provide value to the company." Once again, Ahrens was not asked if she believed there were any other reasons for her termination, and again, Ahrens did not volunteer an answer to the unasked "other reasons" question.

REASONS FOR GRANTING THE WRIT

There are several compelling reasons for granting Ahrens' Petition for Writ of Certiorari. First, the Fifth

Circuit's decision conflicts with this Court's decisions in *Cleveland v. Policy Mgmt. Sys. Corp.*, ___ U.S. ___, 119 S. Ct. 1597 (1999) and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Second, the Fifth Circuit's decision conflicts with a decision from the United States Court of Appeals for the First Circuit, as well as a previous decision from the Fifth Circuit. Finally, the Fifth Circuit's decision departs so far from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power.

A. Conflict With *Cleveland v. Policy Mgmt. Sys.*

Just last year, this Court unanimously reversed the Fifth Circuit in another case involving judicial estoppel. In *Cleveland v. Policy Mgmt. Sys. Corp.*, ___ U.S. ___, 119 S. Ct. 1597 (1999), this Court examined the propriety of applying judicial estoppel to bar recovery in an employment discrimination suit brought under the ADA. This Court unanimously held that not only was judicial estoppel inappropriate to automatically prevent claims of the sort brought by *Cleveland*, but also that the law does not even erect a strong presumption against success on the merits in those claims. This petition for writ of certiorari should be granted because the Fifth Circuit's decision ignores this Court's instruction in *Cleveland* concerning the doctrine of judicial estoppel.

In *Cleveland*, this Court examined whether judicial estoppel should bar a disability discrimination claim by a former employee who had applied for and received SSDI benefits when the former employee claimed in her SSDI benefits application that she was totally disabled, but claimed in her ADA case that she could perform the essential functions of her job with reasonable accommodation. *Cleveland*, ___ U.S. at ___, 119 S. Ct. at 1599-

1600. In ruling that judicial estoppel does not necessarily bar claims in those circumstances, ___ U.S. at ___, 119 S. Ct. at 1603, this Court announced several principles that apply equally to this case and that show that judicial estoppel in this case was inappropriate.

In *Cleveland,* this Court held that judicial estoppel is inappropriate in the circumstances of that case because "there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side-by-side." *Cleveland*, ___ U.S. at ___, 119 S. Ct. at 1602. This principle is equally applicable here. A termination could be the result of several factors, including tortious interference and unlawful discrimination. Neither a tortious interference claim nor a discrimination claim requires proof of sole causation. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (Title VII discrimination claim); *McNely v. Oncale Star-Banner Corp.*, 99 F.3d 1068, 1073 (11th Cir. 1996), *cert. denied*, 520 U.S. 1228 (1997) (ADA discrimination claim); *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997) (tortious interference claim). Because neither tortious interference claims nor discrimination claims require proof of sole causation, they can "comfortably exist side-by-side," thereby making judicial estoppel inappropriate in this case.

Further, this Court in *Cleveland* drew a distinction between conflicting factual statements (e.g. the light was red; the light was green) and conflicting statements that imply a legal conclusion (e.g. I am disabled for purposes of the Social Security Act, and I am not disabled for purposes of the ADA). *Cleveland*, ___ U.S. at ___, 119 S. Ct. at 1601-02. Like the plaintiff's statements in *Cleveland*, Ahrens' statements are not

conflicting statements about purely factual matters; rather, they are statements of an opinion that imply a legal conclusion as to the causes of her termination.

B. Conflict With *Price Waterhouse v. Hopkins*

The Fifth Circuit's decision also conflicts with *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and substantially weakens judicial recourse for victims of unlawful employment discrimination. The Fifth Circuit implicitly holds that Ahrens' termination could not be the result of more than one causal factor. Accordingly, the real effect of the Fifth Circuit's decision is to prevent a terminated employee (not blessed with clairvoyance as to the true employer motive for discharge) from claiming that the termination was caused by more than one factor. If the employee does so, he has presented inconsistent positions and will be judicially estopped from proceeding with his claims.

Title VII and the ADA prohibit employers from making certain employment decisions "because of" certain protected characteristics. *See* 42 U.S.C. §§ 2000e-2(a) and 12112(a). As noted in *Price Waterhouse*, *"the words 'because of' do not mean 'solely because of.'"* *Price Waterhouse*, 490 U.S. at 241 and n.7 (noting that "Congress specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of,' citing 110 Cong. Rec. 2728, 13837 (1964)) (emphasis added).

The Fifth Circuit's use of judicial estoppel in this case ignores the possibility that a termination can be caused by more than one factor, impermissible or otherwise. In *Price Waterhouse*, the plurality illustrated the incorrectness of the dissent's approach to causation in that case through the following example:

> Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it, *neither* physical force was a 'cause' of the motion unless we can show that but for one or both of them, the object would not have moved; apparently both forces were simply 'in the air' unless we can identify at least one of them as a but-for cause of the object's movement. Events that are causally overdetermined, in other words, may not have any 'cause' at all. This cannot be so.

Id. at 241. The Fifth Circuit's reasoning is no different than the dissent's approach in *Price Waterhouse*, for it prohibits an employee from claiming that her termination caused by more than one reason. As illustrated above, this view has been rejected in *Price Waterhouse* and was rejected by Congress when drafting Title VII. Moreover, the Fifth Circuit's approach creates a double standard. While an employer can literally lie to the judge and jury about the true motive for a discharge, without necessarily suffering an adverse ruling,[2] the court will dismiss the employee's claim as a matter of law if he claims more than one illegal factor was determinative in his discharge.

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[2] In St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742 (1993), this Court ruled that an employee is not entitled to prevail as a matter of law when the employer's stated reason for the termination is proven to be false. Instead, the question of illegal versus legal motive goes to the factfinder for determination by a preponderance of the evidence. Id. 113 S. Ct. at 2751. In essence, this Court, in Hicks, rejected the notion of judicial estoppel against an employer, reasoning that: "By producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, [the employer sustained its] burden of production, and thus placed [itself] in a 'better position than if [it] had remained silent.'" Id. at 2748.

C. *Conflict with Fifth Circuit and First Circuit Cases*

This petition for writ of certiorari should also be granted because the Fifth Circuit's decision contradicts both prior Fifth Circuit precedent and a First Circuit decision in a similar case.

The Fifth Circuit determined that Ahrens' statements in the first lawsuit and in this lawsuit concerning the cause of her termination were so inconsistent as to judicially estop Ahrens from pursuing her discrimination claims. However, that conclusion ignores and directly contradicts the Fifth Circuit's decision in *Mitchell v. Fruehauf Corp.*, 568 F.2d 1139 (5th Cir. 1978) and the First Circuit's decision in *Estate of Spinosa v. Int'l Harvester Co.*, 621 F.2d 1154 (1st Cir. 1980). Both *Mitchell* and *Spinosa* concern the first element of a judicial estoppel analysis, i.e. whether two statements are inconsistent. Both cases involved auto accidents where the injured party or the injured party's estate brought two separate lawsuits arising from the same collision and in which the plaintiff alleged that the collision was caused by two separate persons or entities. The Fifth Circuit's decision completely fails to address this authority that demonstrates that Ahrens' statements about the causes of her termination are not inconsistent and should not be used to judicially estop her from pursuing her discrimination claims.

In *Mitchell*, a driver injured in an auto collision filed two separate lawsuits arising from the collision. In the first lawsuit, the injured plaintiff sued the other driver and the company that owned the tractor-trailer involved in the collision, claiming that the collision was caused by the negligence of the other driver. *Mitchell*,

568 F.2d at 1141 and 1147. The injured plaintiff later settled that suit for $450,000, *id.* at 1141, and in the very same month as that suit was settled, the injured plaintiff filed a second lawsuit arising from the same collision. In the second suit, the injured plaintiff claimed that the collision was caused by a defectively designed, unreasonably dangerous trailer manufactured by Fruehauf, who was not a defendant in the first suit. *Mitchell*, 568 F.2d at 1141. The issue in *Mitchell* was whether the plaintiff's pleadings in the first suit were inconsistent with the plaintiff's position in the second suit so that the prior pleadings would be admissible in the trial in the second suit. *Id.* at 1147. The Fifth Circuit ruled that the prior pleadings were not admissible because the injured plaintiff's position in the two lawsuits was not inconsistent, when the prior suit based on negligence was not inconsistent with recovery in the products liability case. *Id.*

In *Spinosa*, the First Circuit reached a similar conclusion. In that case, two separate wrongful death actions were brought arising out of an auto collision. In the first suit, the administratrix of the decedent's estates alleged that the victims' deaths were caused by the negligent failure of the vehicle owner to maintain the vehicle and have it properly inspected and licensed. *Id.* at 1157. In the second suit, the administratrix claimed that the victims' deaths resulted from the vehicle's defective design. As in *Mitchell*, the issue in *Spinosa* was whether the two allegations were inconsistent so that prior pleadings from the initial suit would be admissible in the second suit. *Id.* The First Circuit affirmed the district court's exclusion of the prior pleadings, specifically finding that the administratrix's positions were not inconsistent, since she claimed in the first suit that

the truck owner's actions were a cause, rather than the sole cause, of the accident. *Id.* The First Circuit held that it was not inconsistent for two lawsuits to be brought - - one against the vehicle owner and one against the vehicle manufacturer - - since both can have a role in the plaintiff's injury. *Id.*

Ahrens' statements in her two lawsuits as to the causes of her termination are no different than the plaintiffs' statements in *Mitchell* and *Spinosa*. In all three cases, two or more defendants were sued for the same event that led to the plaintiff's injury, and in all three cases, there could have been more than one cause of plaintiff's injury. Just as there can be more than one cause for an auto collision, there can be more than one cause for a termination. The Fifth Circuit's decision in this case directly contradicts both *Mitchell* and *Spinosa* without any explanation whatsoever. This petition for writ of certiorari should be granted to address this conflict.

D. *Departure from Usual Course of Judicial Proceedings*

The Fifth Circuit's use of judicial estoppel to bar Ahrens' discrimination claims is such a departure from the accepted and usual course of judicial proceedings so as to warrant an exercise of this Court's supervisory power. Not only does the Fifth Circuit's decision conflict with the principles announced by this Court in *Cleveland* and the decisions of the Fifth Circuit in *Mitchell* and the First Circuit in *Spinosa*, but the decision to apply judicial estoppel in this case also contradicts the original purpose of judicial estoppel, ignores the purpose of FED. R. CIV. P. 56 and undermines the Congressional policy against discriminatory employment practices.

At the summary judgment stage, the evidence and inferences that may be drawn from it must be construed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). Instead of doing so, the Fifth Circuit and the district court construed evidence against Ahrens, as Ahrens did not even present the statement that is allegedly inconsistent from her statements in the first lawsuit as evidence in this suit.[3] Rather than rely on her own statement of opinion about why she was terminated, Ahrens presented independent, direct evidence of discriminatory animus in an attempt to defeat Perot Systems' Motion for Summary Judgment, yet both the Fifth Circuit and the district court failed to construe such evidence in Ahrens' favor as required by *Matsushita* and its progeny.

Additionally, the Fifth Circuit's decision effectively rewrites the law governing discrimination claims. It literally treats the important distinction between sole cause and motivating cause as nothing more than mere "hairsplitting." By judicially estopping Ahrens from pursuing discrimination claims because of her prior tortious interference lawsuit, the Fifth Circuit has implicitly determined that discrimination claims and tortious interference claims are inherently inconsistent and cannot "exist side-by-side." *See Cleveland*, ___ U.S.

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[3] Both the district court and the Fifth Circuit are mistaken on this point. Both suggested that Ahrens relied on her own statement in her response to Perot Systems' Motion for Summary Judgment. Contrary to what these courts assumed, Ahrens relied on statements made by others concerning the reasons of her termination (specifically, comments made by Mordhorst, her former supervisor), not her own statement of opinion concerning the reason for her termination.

___, 119 S. Ct. at 1602. The Fifth Circuit's decision undermines the Congressional policy to eliminate unlawful discrimination in employment. If Ahrens' discrimination claims are inconsistent from her prior tortious interference claim, then nothing prevents the Fifth Circuit from ruling that one lawsuit alleging multiple types of discrimination is also inconsistent. It is no more inconsistent for an employee to claim that a termination was caused by discrimination and tortious interference than it is for that employee to claim that a termination was caused by both race discrimination and sex discrimination, for example. Following the Fifth Circuit's reasoning, if there were evidence of discriminatory animus against the employee based on two or more protected characteristics (which, in this case, there are)[4], the employee would be faced with having to gamble on which type of discrimination claim to bring, because under the Fifth Circuit's reasoning, bringing both claims would be inconsistent, and the employee would be judicially estopped from doing so. This expansion of the judicial estoppel doctrine would seriously undermine the congressional policy against unlawful discrimination in employment.

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[4] In this case, there is compelling direct evidence that Perot Systems' and its managers discriminated against Ahrens because of both her sex and her perceived disability. Because the only issue before this Court is whether judicial estoppel was appropriate, this evidence is not included in the Petition.

CONCLUSION

For all the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:96-CV-2047-L

WENDY J. AHRENS,
Plaintiff

v.

PEROT SYSTEMS CORPORATION,
Defendant

Submitted February 3, 1999
Filed February 3, 1999

Before SAM A. LINDSAY,
United States District Judge

JUDGMENT

This judgment is entered pursuant to the court's memorandum opinion and order of February 3, 1999. It is therefore ORDERED, ADJUDGED, and DECREED that Plaintiff take nothing by her suit against Defendant, that this action is hereby dismissed with prejudice, and that all costs are taxed against Plaintiff..

SO ORDERED and signed this 3rd day of February, 1999.

/s/ Sam A. Lindsay
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:96-CV-2047-L

WENDY J. AHRENS,
Plaintiff

v.

PEROT SYSTEMS CORPORATION,
Defendant

Filed February 3, 1999

MEMORANDUM OPINION AND ORDER

The court has before it Perot Systems' Motion for Summary Judgment, filed July 24, 1998, and Defendant's Objections to and Motion to Strike Evidence Filed With Plaintiff's Response to Defendant's Motion for Summary Judgment, filed August 18, 1998. Upon careful consideration of the motions, responses, replies, and the applicable law, the court has determined that for the reasons that follow, Perot Systems' Motion for Summary Judgment should be granted, and its Objections to and Motion to Strike Evidence Filed With Plaintiff's Response to Defendant's Motion for Summary Judgment should be denied as moot.

I. Factual Background

Plaintiff Wendy Ahrens ("Ahrens") worked in sales for Perot Systems Corporation ("Perot Systems") begin-

ning in September 1992,[1] and worked there through December 1, 1995.[2] During her employment with Perot Systems, Ahrens was assigned to various departments and accounts.[3] In November 1994, Ahrens took a medical leave of absence from her job.[4] She returned to work at Perot Systems in February or March 1995.[5] Upon her return from leave, Ahrens was assigned to work in a sales support position, reporting to Johnnie Howard ("Howard"), a female manager at Perot Systems.[6] On December 1, 1995, Perot Systems terminated Ahrens.[7]

II. Plaintiff's Claims

Ahrens alleges that she was illegally terminated because she is a woman, in violation of Title VII, 42 U.S.C. § 2000c, *et seq*. She further alleges that although she was not disabled, Perot Systems perceived her as an individual with a disability, and therefore her firing also runs afoul of the Americans With Disabilities Act ("ADA"), 42 U.S.C.§ 12101, *et seq*. Perot Systems maintains that her boss (also a woman) had to reorganize her department due to budgetary constrains and decided that the way to do this was to eliminate Ahrens' position.

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[1]Plaintiff's First Amended Complaint and Jury Demand ("Amended Complaint").

[2]Appendix in Support of Defendant Perot Systems Corporation's Motion for Summary Judgment ("Defendant's App.), at 1281-82.

[3]Amended Complaint: Defendant's App. at 1172-77.

[4]Defendant's App. at 376; 903; 929.

[5]Appendix in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment ("Plaintiff's App.") at 010.

[6]Defendant's App. at 1175-76.

[7]*Id.* at 1281-82.

III. Summary Judgment Standard

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986); *Ragas v. Tennessee Gas Pipeline Company*, 136 F.2d 455, 458 (5th Cir. 1998). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Ragas*, 136F.2d at 458.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Ragas*, 136 F.3d at 458. Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support Plaintiff's opposition to Defendant's motion. *Id.*, *Skotak v. Tenneco Resins, Inc.*,

953 F.2d 909, 915-16 & n.7 (5th Cir.), *cert. denied,* 506 U.S. 832 (1992). "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Disputed fact issues which are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

IV. Defendant Perot Systems' Motion for Summary Judgment

Perot Systems moves for summary judgment on Plaintiff's claims in their entirety. In support of its motion, Perot systems argues that there is no genuine issue of material fact present in the record concerning Ahrens sex and disability discrimination claims. Perot Systems further argues that judicial estoppel should apply due to inconsistent statements she made in a previous lawsuit, which would prevent her from recovering against Perot Systems here, and that Ahrens should not be allowed to survive summary judgment based upon her inconsistent testimony in this lawsuit.

A. Judicial Estoppel

1. The First Lawsuit

On December 1, 1995, the same day she was terminated by Perot Systems, Ahrens filed suit in the 192nd Judicial District Court of Dallas County, Texas. This lawsuit was styled *Wendy J. Ahrens, et al v.*

Image Sciences, Inc., Michael D. Andereck, James M. Morton, Evan Chesler, Cravath, Swain & Moore, and International Business Machines Corporation, Cause No. 95-12586-K (the "First Lawsuit").[8] Perot Systems was not a party to the First Lawsuit.[9] In the First Lawsuit, Ahrens specifically complained of the conduct of Chesler, Cravath Swain, and IBM (the "IBM Defendants") by stating that they had disparaged her to Perot Systems, causing her employment relationship with Perot Systems to deteriorate.[10]

Defendants in the First Lawsuit removed the case to federal court and it was assigned to United States District Judge Jorge A. Solis.[11] Cravath, Swain and Evan Chesler then moved to dismiss. In her response, Ahrens submitted a sworn declaration that stated Cravath Swain and Chesler had interfered with her employment relationship with Perot Systems, and that "because of the interference, my employment with Perot Systems became more burdensome and difficult, and I was ultimately terminated."[12]

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[8]Defendant's App. at 1321-36.

[9]*Id.*

[10]*Id.*

[11]*Id.* at 1317-19.

[12]*Id.* at 1353.

Next, Ahrens filed a motion to remand the First Lawsuit back to state court.[13] In support of the motion to remand, Ahrens filed another declaration, which adopted her statements in the previous declaration and added that "The IBM defendants disparaged me to Perot Systems and requested that Perot Systems terminate me."[14] Judge Solis granted her motion and remanded the First Lawsuit.[15]

The First Lawsuit continued. Ahrens filed a verified application for injunctive relief in state court. In her verified pleading, Ahrens stated "Perot Systems terminated Wendy Ahrens' employment as a direct result of the interference by the IBM Defendants..."[16] She also supported this pleading with an affidavit that contained the same statement.[17]

When Ahrens was deposed in the First Lawsuit in October 1996, Ahrens testified as follows:

Q: Well, why were you terminated from Perot Systems?

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[13] *Id.* at 1354-55.

[14] *Id.* at 1393.

[15] *Id.* at 1412-1418.

[16] *Id.* at 1421.

[17] *Id.* at 1428.

A: I was terminated because Evan Chesler tortiously interfered with my employment contract.[18]

In November 1996, Ahrens responded to a special appearance filed in the First Lawsuit. In that response she again stated that she was terminated by Perot Systems due to the interference of the defendants in that case.[19]

2. This Lawsuit

In July of 1996, Ahrens sued Perot Systems, alleging that her termination was due to gender. Later that year she amended her complaint to add a claim for disability discrimination.[20] This lawsuit was originally assigned to Judge Solis, who had presided over the first lawsuit while it was pending in federal court.

In July 1998 Ahrens was deposed in this lawsuit. She was asked a question identical to the one in her prior deposition:

Q: Why were you terminated from Perot Systems?

A: I was terminated from Perot Systems because of my sex: Female; that

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[18] *Id.* at 1312.

[19] *Id.* at 1436.

[20] Ahrens filed two charges of discrimination with the EEOC prior to filing this lawsuit. She received her right to sue letters related to these charges on May 3, 1996 and August 28, 1996.

> women weren't given the opportunity to be successful at Perot Systems that men would be; and that--because of the fact that I was considered damaged goods or handicapped and unable to provide value to the company.[21]

3. Applicability of Judicial Estoppel

Perot Systems argues that Ahrens' sworn statements in the First Lawsuit directly contradict her statements in this lawsuit, and that therefore the doctrine of judicial estoppel should apply to prevent her from recovering against Perot Systems in this case.

Judicial estoppel applies where a party attempts to contradict his own prior sworn statements in the same or an earlier legal proceeding. *Afram Carriers, Inc. v Moeykens*, 145 F.3d 298, 303 (5th Cir. 1998); *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996); *United States ex rel. Am. Bank v C.I.T. Construction, Inc. of Texas*, 944 F.2d 253, 258-59 (5th Cir. 1991). The majority of courts will not apply the doctrine unless the party has successfully persuaded the court to accept its earlier position. *Afram Carriers*, 145 F.3d at 303; *C.I.T. Construction*, 944 F.2d at 259; *Moore v. United Services Automobile Association*, 808 F.2d 1147, 1153 n.6 (5th Cir. 1987). Judicial estoppel prevents inconsistent

[21] Defendant's App. at 801.

results, precludes litigants "from playing fast and loose" with the courts, and prohibits parties from deliberately changing positions to suit their needs at the moment. *Ergo Science*, 73, F.3d at 598, *citing United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993), *cert. denied,* 511 U.S. 1042 (1994). Therefore, the two necessary elements of judicial estoppel are 1) contradictory sworn statements; and 2) reliance on the earlier statement by the court.

a. Contradictory Statements

As outlined above, Perot Systems maintains that Ahrens' sworn statements in the First Lawsuit directly contradict her statements of this lawsuit. Ahrens argues that the statements are not inconsistent with each other. Specifically, she states that in her deposition in the First Lawsuit, she was not asked about possible discrimination by Perot Systems. Therefore, there is no reason she would have brought that up as a reason for her termination. She next argues that the statements are not inconsistent because she never said that the interference of the defendants in the First Lawsuit was the *sole* reason for her termination.

Both of these arguments amount to no more than ineffectual hair

splitting. Ahrens was asked the same unequivocal, open-ended question at both depositions. Both questions concerned the exact same event: Ahrens' termination by Perot Systems. In neither instance was the question qualified in any way concerning the universe of possible reasons for her discharge, nor was it qualified as to whether particular individuals or entities had involvement in the termination. The court is not convinced that judicial estoppel would not apply here.

Finally, Ahrens argues that the statements are not inconsistent because she has never expressly denied that gender and disability discrimination caused her termination. This argument will not prevail either. Ahrens has cited no law which establishes that her second statement cannot be inconsistent because she has never directly denied it; moreover, this is clearly not a requirement under the doctrine of judicial estoppel. Perot Systems has satisfactorily established the inconsistency of Ahrens' sworn statements in the two cases.

b. Adoption of the Earlier Statement by the Court

Perot Systems also must show that Ahrens' prior inconsistent statement was adopted or relied upon by the court in the First Lawsuit. *Afram Carriers*, 145 F.3d at 303; *C.I.T. Construction*, 944 F.2d at 259. Statements explicitly made for the purpose of inducing the court's reliance thereon are subject to judicial estoppel. *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1047 (5th Cir. 1998). Also, where a court has accepted the prior statement as true, judicial estoppel can be applied. *Exxon Corporation v. Oxxford Clothes, Inc.*, 109 F.3d 1070, 1078 n.9 (5th Cir.), *cert. denied*, 118 S. Ct. 299 (1997). Judicial acceptance of the statement is not limited to situations where a party ultimately prevails on merits. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1354 n.73 (S.D. Tex. 1995). *citing Teledyne Industries, Inc. v. N.L.R.B.*, 911 F.2d 1214 (6th Cir. 1990). "Judicial acceptance means only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of final disposition." *Id., quoting*

Teledyne, 911 F.2d at 1218.

Ahrens argues that she cannot be judicially estopped because the First Lawsuit was never fully litigated on the merits. This position is contrary to the above case law, which does not require ultimate success on the merits, only that the court has adopted the previous inconsistent statement. The record establishes that in the First Lawsuit, Ahrens successfully moved to remand the case back to state court. In support of her motion to remand, Ahrens submitted a declaration in which she swore to the court that Perot Systems discharged her because of the alleged tortious interference of several of the defendants to that case. These statements were made for the explicit purpose of convincing the court that it should remand the First Lawsuit to state court; in other words, the statements were made to induce the court's reliance on them. *Hidden Oaks*, 138 F.3d at 1047.

On a motion to remand, all doubts as to removability are resolved in favor of remanding the case to state court. *Shamrock Oil & Cas Corp. v. Sheets,* 313 U.S. 100, 108-09 (1941); *Eastus v. Blue Bell Creameries, L.P.*, 97 F.3d 100,

106 (5th Cir. 1996). In the First Lawsuit, the defendants asserted in their notice of removal that Ahrens had joined two groups of unrelated defendants into one lawsuit for the purpose of defeating federal diversity jurisdiction. Thus, Judge Solis analyzed the remand issue as one of fraudulent joinder. In determining a claim of fraudulent joinder, the district court is required to evaluate all of the factual allegations in the light most favorable to the plaintiff, resolving all contested fact issues in the plaintiff's favor. *Burden v. General Dynamics Corp.*, 60 F.3d 213, 216 (5th Cir. 1995); *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (5th Cir. (Unit A) 1981). In his opinion remanding the case, Judge Solis specifically stated that the court had construed all disputed questions of fact and law in Ahrens' favor.[22] Therefore, the court in the first lawsuit accepted the testimony of Ahrens as true, and necessarily relied on it in deciding to remand the case. *See Exxon Corp.*, 109 F.3d at 1078 n.9. Now Ahrens is asking the court to rely

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[22] Defendant's App. at 1416.

on her contradictory statements in this lawsuit to deny Perot Systems' motion for summary judgment.

The doctrine of judicial estoppel prevents this type of factual manipulation and should be applied here. Ahrens is estopped by her prior sworn statements made in the two declarations she submitted in the First Lawsuit, and which were relied upon by the court in granting her motion to remand. Therefore, Ahrens is prevented from using her contradictory statements here to defeat summary judgment. Viewing the remaining evidence in the record in the light most favorable to Ahrens, the record shows that Ahrens has failed to raise a genuine issue of material fact regarding the essential elements of these claims. Perot Systems is therefore entitled to judgment as a matter of law on all claims asserted by Ahrens.

B. Ahrens' Discrimination Claims

Although the court has concluded that Perot Systems is entitled to judgment as a matter of law based upon the theory of judicial estoppel, the court will proceed to address Ahrens' discrimination claims on their merits. Upon re-

view of these claims, the court finds that Perot Systems is further entitled to summary judgment on Ahrens' discrimination claims because there is no genuine issue of material fact present in the summary judgment record concerning Perot Systems' alleged liability to Ahrens under either the Title VII or the ADA. Thus, for this additional reason, Perot Systems is entitled to summary judgment on these claims.

1. Applicable Standard of Proof

Ahrens and Perot Systems disagree regarding the applicable standard of proof on Ahrens' claims for gender and disability discrimination. Ahrens maintains that the record contains "direct evidence" of both disability and sex discrimination, so therefore the court should apply the "mixed-motives" analysis found in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); see also *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1216-17 (5th Cir. 1995). Perot Systems argues that this is not a "direct evidence" case and therefore the court should follow the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting framework. The Fifth Circuit has made it clear that *McDonnell Douglas* does not apply to mixed-motive cases. *Mooney*, 54 F.3d at 1216, *citing Trans World Airlines v. Thurston*, 469 U.S. 111 (1985). Thus, the court must determine whether the mixed-motive analysis applies here.

To establish that the mixed-motive analysis should apply, a plaintiff must present "evidence of conduct or statements by persons involved in the decision making process that may be viewed as *directly reflecting* the alleged discriminatory attitude..." *Mooney*, 54 F.3d at 1217-18 n.12, *quoting Rudabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 448-49 (8th Cir. 1993)* (emphasis added). In other words, to apply *Price Waterhouse*, the employee must set forth evidence showing that the employer *actually relied* on the discriminatory factor in making its decision. *Mooney*, 54 F.3d at 1218, *quoting Langley v. Jackson State University*, 14 F.3d 1070, 1075 (5th Cir.), *cert. denied* 513 U.S. 811 (1994) (emphasis in original). Ahrens relies on *Mooney* to establish that the alleged statements of fellow Perot Systems employees, including her supervisor, rise to the level of direct evidence of discrimination.

In *Mooney*, the Fifth Circuit evaluated the evidence in that case to determine whether the plaintiff had been entitled to a mixed-motives jury instruction under *Price Waterhouse* 54 F.3d at 1217. The "fundamental prerequisite" to a mixed-motives analysis is the presence of the direct evidence of discrimination. *Id.* "Direct evidence" is defined as evidence which, if believed, establishes discriminatory animus without inference or presumption. *Id.; Brown v. East Mississippi Electric*

Power Ass'n., 989 F.2d 858 (5th Cir. 1993).

The supposed "direct evidence" of discrimination presented by the *Mooney* plaintiffs consisted of the following: statements that one plaintiff was to be replaced by a "younger and cheaper" employee, that the reason for plaintiff's discharge was that it "must have been your age", that plaintiff would have a "good case of age discrimination", and that the company was "going to get rid of the older employees with the higher salaries." 54 F.3d at 1218. The trial court refused to give a *Price Waterhouse* instruction based upon this evidence. *Id.* at 1216. The Fifth Circuit agreed and affirmed, holding that these statements did not provide direct evidence of discriminatory animus. *Id.* at 1218-19. When taken at face value, the statements did not prove discriminatory animus unless an inference or presumption were drawn from them. *Id.* at 1218. Therefore, A *Price Waterhouse* analysis was not appropriate. *Id.* at 1216, 1218.

Ahrens relies on the following "direct evidence" of discrimination to argue that a mixed-motives analysis should be applied here: allegedly being referred to as "damaged goods"; being told that women were not given the same opportunities to use their talents as men; being told that she was paid too much for a woman and that she could not have stock options because they were being reserved for men; being

told that Rob Nash, a Perot Systems manager, did not want women in sales; being told that she received only a satisfactory job rating and did not receive a salary raise because she was on disability leave; and being told that the amount of leave she had taken did not help her employment situation.[23] These statements are similar to the statements relied upon by the *Mooney* plaintiffs, in that while the court or a jury could infer from some or all of these statements that there was discriminatory motive behind Perot Systems' decision to terminate Ahrens, they do not directly prove that this was the case. 54 F.3d at 1218. Therefore, the court declines to apply the Price Waterhouse mixed-motives analysis as requested by Ahrens. The applicable legal standard in this case is the *McDonnell-Douglas* burden-shifting analysis.

1. Sex Discrimination

To establish a prima facie case of sex discrimination, Ahrens must prove the following elements: 1) she was discharged; 2) she was qualified for the position; 3) she was a member of a protected class; and 4) she was replaced by a male or was other-

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[23]Plaintiff's App. at 002-005; 011-013; 019-025; 033; 035; 105-06.

wise discharged because she is a female.[24] *McDonnell-Douglas*, 411 U.S. at 802; *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 654 (5th Cir. 1996). Perot Systems does not dispute Ahrens' ability to establish the first three elements of her prima facie case; however, it claims that Ahrens' prima facie case necessarily fails because it did not replace her with a male. Ahrens re-

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[24]Ahrens argues for a slightly different prima facie standard here, which is applied in reduction in force ("RIF") cases. In a RIF case, a prima facie case is established by showing that 1) plaintiff is a member of a protected class; 2) she suffered an adverse employment decision; 3) she was qualified to assume another available position at the time of the discharge or demotion; and 4) evidence exists from which a fact finder might reasonably conclude that the employer intended to discriminate in reaching its decision. *Woodhouse v. Magnolia Hospital*, 92F.3d 248, 252 (5th Cir. 1996) (applying RIF prima facie standard in ADEA case). The "crucial inquiry", however, in RIF cases is why the plaintiff was selected for termination while other employees who do not belong to the protected class are retained in similar positions. *Id.; Brown*, 82 F.3d at 654. The specialized prima facie standard which has been developed for RIF cases does not apply unless the company lays off protected individuals while retaining non-protected class individuals in *similar* positions. *Brown*, 82 F.3d at 654. Here, Ahrens has made no such allegation; therefore her argument that the prima facie standard for RIF cases should be applied is misplaced. Furthermore, even if the court were to apply the prima facie standard advocated by Ahrens, she is unable to meet at least one prong of the test, that she was qualified to assume another available position at Perot Systems. Ahrens' evidence on this point is a lengthy list of available jobs which is unauthenticated and consists of inadmissible hearsay. Plaintiff's App. at 054-099. Ahrens has produced no evidence showing that she was qualified for any of these jobs, and the court is not obligated to scour the record in search of such evidence. *Ragas*, 136 F.3d at 458.

sponds that based upon the alleged statements of her supervisor, Ms. Howard, that "women at Perot Systems were not always given opportunities to use their talents as readily as men"[25] is sufficient to establish that a jury could reasonably infer that Ahrens' termination was due to her sex. Viewing this evidence in the light most favorable to Ahrens, the court agrees that she has successfully established a prima facie case of sex discrimination.

Given that Ahrens has established her prima facie case, the court must give Perot Systems the opportunity to articulate a legitimate, non-discriminatory reason for its decision to terminate Ahrens from her job. *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 149 (5th Cir. 1995), *cert. denied*, 516 U.S. 1047 (1996); *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993). The record reflects that Ahrens' supervisor Johnnie Howard needed to maintain her departmental expenses at the same level while increasing revenue.[26] Howard chose to accomplish this objective by adding a sales person and eliminating Ahrens' non-revenue producing position.[27] The Fifth Circuit has stated that these types of concerns are legitimate, nondiscriminatory reasons for an employee's dis-

[25]Plaintiff's App. at 033, 105-07.

[26]Defendant's App. at 1189, 1191-92, 1197.

[27] *Id.*

charge. *Armendariz*, 58 F.3d at 150; *Bodenhiemer*, 5 F.3d at 957-58. Therefore, Perot Systems has successfully carried its burden of articulating a legitimate, non-discriminatory reason for Ahrens' discharge.

Ahrens must now show that Perot Systems' articulated reasons for its decision to terminate her are merely a pretext for discrimination; in other words that a discriminatory motive is the true reason she was discharged. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993); *Bodenheimer*, 5 F.3d at 958. To carry her burden here, Ahrens must tender evidence raising a fact issue whether Perot's Systems' proffered reasons for her termination are a pretext for discrimination. *Id.* This requires her to demonstrate "discrete facts" showing a causal nexus between her gender and Perot Systems' decision to discharge her. *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 819 (5th Cir.), *cert. denied,* 510 U.S. 976 (1993). Here, Ahrens merely presents evidence which, at best, might cast some doubt regarding whether Howard's department could have met its budgetary goals without adding a salesperson. *See Moore,* 990 F.2d at 815, *quoting Hanchey v. Energas Co.*, 925 F.2d 96, 97 (5th Cir. 1990) (to demonstrate pretext, plaintiff must do more than merely "cast doubt on whether [the employer] had just cause for its decision"). Ahrens further

cites to the alleged discriminatory comments made by various persons at Perot Systems; however, nowhere has she established the requisite causal nexus between this evidence and the decision to terminate her employment.

Moreover, Ahrens' sworn declarations in the first lawsuit make it impossible for her to meet this prong of the test. In those declarations, Ahrens swore that the cause of her termination was the tortious interference of several of the defendants to that case. This precludes Ahrens from showing a connection between the alleged discriminatory remarks and her ultimate termination. Ahrens has failed to set forth evidence raising a genuine issue of material fact concerning pretext on her sex discrimination claim; therefore, Perot Systems is entitled to summary judgment on Ahrens' title VII cause of action.

3. Disability Discrimination

The ADA prohibits discrimination against "a qualified individual with a disability because of the disability of such individual.." 42 U.S.C § 12102(2). A disability is defined as a physical or mental impairment "that substantially limits one or more of the major life activities of such individual". *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 805 (5th Cir. 1997), *cert. denied,* 118 S. Ct. 1050 (1998). "Substantially limits" generally means that an indi-

vidual is (i) unable to perform a major life activity that the average person in the general population can perform; (ii) significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity." *Id., citing* 29 C.F.R. § 1630.2(j)(1). "Temporary, non-chronic impairments of short duration, with little or no longer term or permanent impact, are usually not disabilities." *Pryor v. Trane Co.*, 138 F.3d 1024, 1026 (5th Cir. 1998).

Even persons who are not actually disabled can be covered by the ADA, where they are "regarded as having such an impairment." *Id.* An individual is "regarded" as disabled under the ADA if (i) she has a physical or mental impairment that does not substantially limit major live activities but is treated by the employer as constituting such limitation; (ii) she has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (iii) she has none of the impairments set forth in the regulations but is treated by the employer as having a substantially limiting impairment. *Id.* at 806; *Ellison v. Software Spectrum,* 85 F.3d 187, 192 (5th Cir. 1996),

citing 29 C.F.R. § 1630.2(1). Ahrens claims that she has none of the impairments contained in the regulations but that Perot Systems regarded her as having substantially limiting impairment and thus terminated her employment because she was so regarded.[28]

To establish a prima facie case of disability discrimination, Ahrens must show that 1) she is disabled under the ADA; 2) she is qualified for the job; 3) she suffered an adverse employment action; and 4) she was replaced by a non-disabled person or otherwise treated unfairly due to her disability. *McDonnell-Douglas*, 411 U.S. at 802; *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995). Ahrens bases her claim of perceived disability on alleged comments by several Perot Systems employees (who did not supervise Ahrens and did not make the decision to terminate her employment)[29] that she was "damaged goods",[30] as well as alleged comments regarding the fact that Ahrens had taken disability leave in the past.[31]

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[28] Defendant's App. at 93-96; 98-99; 375; 377-79; 393-94; 549-52.

[29] Perot Systems maintains that Johnnie Howard alone made the decision to eliminate Ahrens' position. The evidence in the record to this effect appears to be undisputed. Defendant's App. at 1278-79; 1295.

[30] Plaintiff's App. at 002-005; 011-013; 018a, 106.

[31] *Id.* at 016-01; 027-029; 107.

Ahrens apparently interprets these remarks to mean that Perot Systems expected she would be taking more medical leave in the future; however, she has produced no competent evidence to support this factual allegation. Her interpretation of the remarks consists of no more than her subjective belief as to what the alleged comments meant, and does not raise a fact issue concerning her disability claim. *See Waggoner v. City of Garland, Texas*, 987 F.2d 1160, 1164 (5th Cir. 1993). Furthermore, that Perot Systems knew Ahrens had taken medical leave in the past does not establish that she is disabled under the ADA or that Perot Systems regarded her as such. A physical impairment, standing alone, does not necessarily constitute a disability. *Ellison*, 85 F.3d at 191 n.3.

Ahrens further references a comment made by Ms. Howard wherein Howard expressed her doubts about Ahrens' ability to perform her job.[32] In response to this alleged comment, Ahrens assured Howard that her doctor had said she was capable of performing.[33] Taking this exchange as true, it is still questionable whether Ahrens has established a prima facie case of discrimination based upon disability; however, for summary judgment purposes the court will give Ahrens the benefit of the

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[32] *Id.* at 014-015.

[33] *Id.* at 015.

doubt and assume that she has done so.

Next, Perot Systems must articulate a legitimate non-discriminatory reason for Ahrens' termination. As discussed above, Perot Systems has done so. See p. 14, *infra*. Thus, the burden shifts back to Ahrens to set forth evidence raising a fact issue whether Perot Systems' reasons for terminating her employment are merely a pretext, whereas the true reason she was discharged was due to Perot Systems intent to discriminate against her due to her alleged "perceived disability." *Hicks*, 509 U.S. 502, 507 (1993); *Bodenheimer*, 5 F.3d at 958.

Ahrens must set forth "discrete facts" showing a causal nexus between her alleged disability and Perot Systems' decision to discharge her. *Moore*, 990 F.2d at 819. Ahrens has failed to do so. Her attempts to cast doubt on the true budgetary situation in Ms. Howard's department will not permit her to survive summary judgment. *Id.* at 815. Ahrens has further failed to demonstrate any causal nexus between the alleged comments concerning her disability and her discharge.

Ahrens has compounded the difficulties with her case by swearing that the cause of her termination was tortious interference of several of the defendants to the first lawsuit. Therefore, Ahrens is unable to demonstrate a connection between the al-

leged discriminatory remarks and her discharge. There is no genuine issue of fact present here concerning whether Perot Systems' stated reason for Ahrens' termination was actually a pretext for disability discrimination, therefore, Perot Systems is entitled to summary judgment on Ahrens' ADA claim.

C. Mental Anguish

Perot Systems has further moved for summary judgment on the mental anguish clement of Ahrens' compensatory damages claim. Perot Systems states that there is no evidence in the record to raise a fact issue concerning whether Ahrens has actually suffered mental anguish as alleged. Given the court's ruling that Perot Systems has no liability to Ahrens under either Title VII or the ADA, this portion of Perot Systems' motion is of no moment and will not be considered by the court.

V. Perot Systems' Objections to and Motion to Strike Summary Judgment Evidence

Perot Systems has lodged numerous objections to Ahrens' summary judgment evidence. In reaching its decision, the court did not rely on the challenged evidence. Therefore, Defendant's Objections to and Motion to Strike Evidence Filed With Plaintiff's Response to Defendant's Motion for Summary Judgment is denied as moot.

VI Conclusion

For the reasons previously stated by the court, no genuine issue of material fact exists with respect to Ahrens' claims of discrimination, and Perot Systems is entitled to judgment as a matter of law. Perot Systems is entitled to summary judgment on Ahrens' claims for sex and disability discrimination under Title VII and the ADA, respectively. Therefore, it is hereby

ORDERED that Defendant Perot Systems Corporation's Motion for Summary Judgment is **GRANTED**. Ahrens' claims for sex discrimination under Title VII and disability discrimination under the ADA are dismissed with prejudice. It is further

ORDERED that Defendant's Objections to and Motion to Strike Evidence Filed With Plaintiff's Response to Defendant's Motion for Summary Judgment is **DENIED AS MOOT**. Judgment will be entered by separate document.

Signed this 3rd day of February, 1999.

/s/ Sam A. Lindsay
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10255

WENDY J. AHRENS,
Plaintiff-Appellant,

versus

PEROT SYSTEMS CORP.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

Filed March 3, 2000

Before JONES, BARKSDALE, and DENNIS, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Summary judgment having been awarded Perot Systems Corp., primarily at issue is whether judicial estoppel precludes Wendy J. Ahrens' claim of discriminatory discharge by Perot Systems, in the light of her claim, in an earlier action, of discharge because of tortious interference with that employment. We **AFFIRM** .

I.

Perot Systems hired Ahrens in 1992. She took a medical leave of absence in November 1994, and was released to return to work the following February.

That November, her supervisor, Howard, told her that, because of the 1996 budget, it was possible that Ahrens' role would change, and suggested that she look for other positions. On 1 December, Howard discharged Ahrens.

That same day, Ahrens filed an action in state court against Image Sciences, Inc. (a former employer), Andereck (its president), Morton (apparently its employee), International Business Machines Corporation (Image Sciences' co-defendant in an action in which Ahrens was deposed), Cravath, Swain & Moore (law firm which represented IBM), and Chesler (Cravath attorney who allegedly contacted Perot Systems in January 1995 and requested Ahrens' termination). She claimed, *inter alia* , that IBM, Chesler, and Cravath had tortiously interfered with her employment with Perot Systems.

In April 1996, Ahrens filed a discrimination charge with the Equal Employment Opportunity Commission, in which she swore that Perot Systems discriminated against her on the basis of her gender by discharging her in December 1995. In early May, she received a notice of right to sue letter for that charge. That July, she filed this action in federal court against Perot Systems, claiming gender discrimination discharge, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq.

Shortly before filing this action, Ahrens filed a second EEOC charge, in which she swore that Perot Systems discharged her because it regarded her as disabled. That August, she received a notice of right to sue letter for that charge. That November, she amended her complaint to add that her discharge was also motivated by disability discrimination, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq . (ADA).

Perot Systems moved for summary judgment, asserting, *inter alia*, that Ahrens was judicially estopped from pursuing her discrimination claims because of sworn statements made during the earlier-filed tortious interference action; and, alternatively, that she could not prove that her discharge was motivated by either gender or disability discrimination.

Summary judgment was granted Perot Systems in February 1999, on the judicial estoppel basis, the court concluding that Ahrens' claim in this discrimination action was inconsistent with that asserted previously in the interference action, and that the district court in the latter had relied on her inconsistent position there in granting her motion to remand that action to state court. Alternatively, such judgment was awarded Perot Systems because Ahrens had *not* created a material fact issue for her discrimination claims.

II.

Ahrens challenges both bases for the summary judgment. Because we agree with the district court on judicial estoppel, we do *not* reach its alternate ruling.

A summary judgment is reviewed *de novo* , applying

the same standard applied by the district court. *E.g.*, ***Horton v. City of Houston, Tex.*** , 179 F.3d 188, 191 (5th Cir.), *cert. denied,* ___ U.S. ___, 120 S. Ct. 530 (1999). Such judgment is proper if the summary judgment record, viewed in the light most favorable to the non-movant, establishes that "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law". Fed. R. Civ. P. 56(c); ***Horton***, 179 F.3d at 191.

The district court's invocation of judicial estoppel is reviewed for abuse of discretion. ***In re Coastal Plains, Inc.*** , 179 F.3d 197, 205 (5th Cir. 1999), *cert. denied,* ___ U.S. ___, 120 S. Ct. 936 (2000). "Judicial estoppel applies to protect the integrity of the courts — preventing a litigant from contradicting its previous, inconsistent position when a court has adopted and relied on it." ***Afram Carriers, Inc. v. Moeykens***, 145 F.3d 298, 303 (5th Cir. 1998), cert. denied , 525 U.S. 1141 (1999). It "is a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position". ***Coastal Plains***, 179 F.3d at 205 (internal quotation marks and citation omitted). "Most courts have identified at least two limitations on the application of the doctrine: (1) it may be applied only where the position of the party to be estopped is clearly inconsistent with its previous one; and (2) that party must have convinced the court to accept that previous position." ***Id.*** at 206.

A.

Ahrens maintains that neither of the two bases for judicial estoppel is satisfied.

1.

Ahrens contends that her position in this action — discharged because of discrimination — is *not* inconsistent with her position in her first action — discharged because Chesler, Cravath, and IBM (the IBM defendants) tortiously interfered with her employment with Perot Systems.

The complaint in the interference action, filed 1 December 1995, *the day of termination*, claimed:

> [T]he contact of Perot Systems ... by [the IBM defendants] constituted interference with the employment relationship. [The IBM defendants'] interference altered Perot Systems' good relationship with ... Ahrens. She became suspect and has not been provided the same status and pay she would have attained absent the interference. Because of the interference, ... Ahrens' employment has become more burdensome and difficult.

On 2 January 1996, claiming fraudulent joinder, the IBM defendants removed the action to federal court. Ahrens submitted a sworn declaration late that month, in support of her response to the IBM defendants' motion to dismiss. The declaration, which employed language almost identical to that in her complaint, quoted above, stated:

> The contact of Perot Systems, by [the IBM defendants] constituted interference with my employment relationship. [The IBM defendants'] interference altered Perot Systems' good relationship with me. I became suspect and was not provided the same status and pay I would have attained absent

> the interference. Because of the interference, my employment with Perot Systems became more burdensome and difficult, and I was ultimately terminated.

Early that February, Ahrens moved to remand her interference action to state court. In support, she submitted a sworn declaration, in which she adopted and incorporated by reference her statements in the above-quoted January declaration, and stated that "[t]he IBM defendants disparaged [me] to Perot Systems and requested that Perot Systems terminate [me]". The district court granted the remand motion.

In state court in late August 1996, following remand, Ahrens filed a sworn application for an injunction, seeking to prohibit defendants from interfering with her employment, and a supporting affidavit, in which she stated that "Perot Systems terminated [her] employment as *a direct result of the interference by the IBM Defendants* ...." (Emphasis added.) This "direct result" claim was made less than two months after her gender discrimination claim was filed in federal court.

In her deposition in the interference action in late October 1996, *approximately three months after* she filed her original complaint in this action, claiming gender discrimination, and *just weeks before* she amended it to add a claim for perceived disability discrimination, Ahrens testified as follows:

> Q. Well, why were you terminated from Perot Systems?
>
> A. *I was terminated because ... Chesler tort[i]ously interfered with my employment contract.*

(Emphasis added.)

On 19 November 1996, *four days after* she filed her amended complaint in this action, claiming gender and perceived disability discrimination, Ahrens filed a "Response to Special Appearance" in the state court interference action, in which she stated:

> The contact of Perot Systems, by [the IBM defendants] constituted interference with my employment relationship. [The IBM defendants'] interference altered Perot Systems' good relationship with me. [I] became suspect and was not provided the same status and pay [I] would have attained absent the interference. Because of the interference, my employment with Perot Systems became more burdensome and difficult, and I was ultimately terminated. [The IBM defendants] knew about [my] employment relationship and intended to induce a breach or termination of the relationship proximately causing damages to [me].

In contrast, in her deposition on 18 July 1998 in this action, Ahrens testified that she was discharged because of her gender and perceived disability:

> Q Why were you terminated from Perot Systems?
>
> A I was terminated from Perot Systems because of my sex: Female; that women weren't given the opportunity to be successful at Perot Systems that men would be; and that - because of the fact that I was considered damaged goods or handicapped and unable to provide value to the company.

In opposing Perot Systems' summary judgment motion on her discrimination claims, and in order to provide evidence of discriminatory animus, Ahrens relied on statements by Perot Systems' employees dating as early as 1993, *approximately two years before she was discharged in December 1995 and filed the tortious interference action* . But, as noted, in that interference action, she maintained that her employment relationship with Perot Systems *had been good until January 1995* , when the IBM defendants tortiously interfered with it through Chesler contacting Perot Systems.

Ahrens maintains that there is *no* inconsistency in her positions in the two actions because she has never claimed, or been required to prove, that her discharge was caused solely either by tortious interference or by discrimination. She asserts that her statements in the first action (discharged because of tortious interference) were *not* admissions that there were no other causes for discharge; and that, even if tortious interference was part of the reason for discharge, it would *not* foreclose finding discrimination was also part of the motivation for it.

Ahrens' claim that she was *not* required to prove that either tortious interference or discrimination was the *sole* cause of discharge is supported by authority. *See* ***ACS Investors, Inc. v. McLaughlin*** , 943 S.W.2d 426, 430 (Tex. 1997) (party alleging tortious interference must prove, *inter alia*, that tortious interference "proximately caused" damage); ***Woodhouse v. Magnolia Hosp.***, 92 F.3d 248, 253 (5th Cir. 1996) (discrimination "need not be the sole reason for the adverse employment decision, [but] must actually play a role in the employer's decision making process and have a determinative in-

fluence on the outcome"); ***McNely v. Ocala Star-Banner Corp.***, 99 F.3d 1068, 1077 (11th Cir. 1996) (in ADA context, "because of" does *not* mean "solely because of"), cert. denied , 520 U.S. 1228 (1997).

Nevertheless, her attempt to reconcile her inconsistent positions on the basis that she was never asked for the *sole* reason for discharge is unavailing. She is *not* excused from giving incomplete, inconsistent responses to broad, open-ended, *identical* questions simply because they did *not* ask for the *sole* reason for her discharge.

In each action, she was asked: why were you terminated. For each action, she gave a glaringly inconsistent, all-encompassing, non-qualified response. For the first action, discharge was due to tortious interference; for the second, discrimination. Accordingly, the first requirement for judicial estoppel — use of inconsistent positions — is satisfied.

2.

As noted, in applying judicial estoppel, the district court held that, in granting Ahrens' motion to remand the interference action to state court, the district court had accepted, and relied on, Ahrens' position that Perot Systems terminated her employment because of tortious interference. Ahrens contends that her statements concerning discharge because of such interference (which were inconsistent with her later discriminatory-discharge statements) were neither accepted, nor relied on, by the district court in deciding to remand her first action. She maintains that, in determining that the Texas resident defendants had *not* been fraudu-

lently joined and that remand was appropriate, the district court accepted as true, to permit joinder, only her statements that the claims against defendants were sufficiently related and arose out of the same series of transactions, but *not* her statements regarding the cause of discharge.

We disagree. Ahrens named six defendants in her interference action: Image Sciences, Inc. (ISI), Andereck, and Morton (collectively, the ISI defendants), and the three IBM defendants. The ISI defendants were Texas residents. Ahrens presented breach of contract claims against all three ISI defendants; and invasion of privacy, intentional infliction of emotional distress, fraud, negligent misrepresentation, rescission, and breach of fiduciary duty claims against ISI and Andereck. Only the IBM defendants were charged with tortious interference.

The IBM defendants, Texas non-residents, removed the action to federal court on the basis that Ahrens' claims against the ISI defendants arose out of facts unrelated to, and separate from, her claims against the IBM defendants; and that Ahrens had joined the ISI defendants in order to prevent removal. In support of her remand motion, Ahrens asserted that her claims against the ISI defendants and the IBM defendants arose out of the same series of transactions, and were sufficiently related to permit joinder. She explained that ISI, her former employer, facilitated the IBM defendants' tortious interference by providing confidential and disparaging information to them for their use against her; and that both ISI and the IBM defendants sought to intimidate her and discredit her testimony as

a witness in an action against ISI and IBM. In her sworn declaration in support of her remand motion, Ahrens stated that, in an effort to discredit and pressure her regarding her testimony in that action, the IBM defendants disparaged her to Perot Systems and requested her termination.

In remanding the action to state court, the district court, construing the contested issues of law and fact in favor of Ahrens, concluded that defendants had *not* met their burden of demonstrating that the ISI defendants were fraudulently joined. The remand order quotes Ahrens' remand motion, including her assertion that, by providing confidential and disparaging information to the IBM defendants for use against her, the ISI defendants facilitated the IBM defendants' tortious interference with her employment at Perot Systems. Thus, in concluding that Ahrens' claims against the six defendants were sufficiently related to permit joinder (and, thereby, compel remand), the court *necessarily accepted, and relied on*, Ahrens' statements that, by providing disparaging and confidential information that the IBM defendants used to cause Perot Systems to discharge her, the ISI defendants had facilitated the IBM defendants' tortious interference with her employment with Perot Systems.

Accordingly, the second requirement for judicial estoppel — judicial acceptance of, and reliance on, Ahrens' previous inconsistent position — is satisfied.

B.

Ahrens contends, *for the first time on appeal*, that application of judicial estoppel would violate public

policy, because she did *not* intentionally mislead either court. She maintains that, because her statements (opinions) concerning her belief that she was discriminatorily discharged *cannot* conclusively establish discriminatory intent on the part of Perot Systems, and were *not* presented by her as evidence in opposition to summary judgment, those statements should *not* be used to preclude her discrimination claims.

Because Ahrens did *not* present this contention in district court, she *cannot* prevail on it here, unless she succeeds under our quite restricted review for plain error: establishes a clear or obvious error that affected her substantial rights, and *also* persuades us to exercise our discretion to correct it. *See* ***Highlands Ins. Co. v. National Union Fire Ins. Co.***, 27 F.3d 1027, 1032 (5th Cir. 1994), *cert. denied* , 513 U.S. 1112 (1995).

Contrary to Ahrens' assertion, she *did* , in opposing summary judgment, rely on her statements (opinions) regarding the cause of her discharge. Her response to the motion includes her deposition testimony that Perot Systems discriminated against her because she is a woman and was perceived as disabled.

In any event, Ahrens has *not* cited any authority for the proposition that, in discrimination actions, public policy exempts plaintiffs from application of judicial estoppel to preclude their reliance on inconsistent positions regarding the cause of adverse employment decisions. Ahrens has *not* shown plain error.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

Supreme Court, U.S.
FILED
JUN 5 2000
CLERK

(2)

No. 99-1933

In The

Supreme Court of the United States

WENDY J. AHRENS,

Petitioner,

v.

PEROT SYSTEMS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

A plaintiff sued third parties, alleging that they interfered with and ultimately caused the termination of her employment with her employer. In the lawsuit against the third parties, plaintiff supported a motion to remand with testimony that her relationship with her employer was positive and untarnished until the interference of the third parties. The lawsuit against the third parties was then remanded to state court. After remand, the plaintiff filed suit against her employer, asserting that she was terminated for discriminatory reasons, as evidenced by alleged discriminatory comments made before her termination. Is the plaintiff judicially estopped from bringing the discrimination lawsuit against her former employer?

DISCLOSURE PURSUANT TO RULE 29.6

The petition for writ of certiorari accurately lists the parties to the proceeding. There is no parent corporation of respondent Perot Systems Corporation and no publicly-held company owns 10% or more of Perot Systems Corporation's stock.

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STATEMENT OF THE CASE

The critical facts and procedural background are undisputed and are accurately set forth in the opinions of the court of appeals and district court. *Ahrens v. Perot Systems Corporation*, 205 F.3d 831 (5th Cir. 2000); 39 F. Supp.2d 773 (N.D. Tex. 1999). In contrast, petitioner's statement of the case omits or obscures several critical and indisputable facts:

1) Petitioner filed a lawsuit against defendants wholly unrelated to respondent (the "Tortious Interference Lawsuit"), in which she took the position that prior to the interference of third parties, her employment relationship with respondent was entirely positive, and that it was the interference of the third parties that caused her employment relationship with respondent to deteriorate and ultimately to be terminated.

2) While the Tortious Interference Lawsuit was still ongoing, petitioner filed this lawsuit against respondent, in which she took the position that she had been terminated because she was a woman and because she was perceived to be disabled, and testified to numerous instances of alleged discriminatory conduct that occurred long before her employment was terminated.

3) Petitioner testified in this lawsuit that her female supervisor made numerous remarks to her that are "direct evidence" of discriminatory animus, during the year preceding the termination of petitioner's employment with respondent. Therefore, at the time she

> *filed the* Tortious Interference Lawsuit, petitioner knew about most of the incidents that she alleges support her claims of discrimination. This is directly contrary to the suggestion in her petition that she only became aware of the alleged discriminatory animus after the termination of her employment.

In light of these critical facts, the rulings of the courts below were not just correct, but were entirely consistent with the Court's prior holdings.

REASONS FOR DENYING THE WRIT

ARGUMENT

I. The Decisions of the Courts Below Are Correct.

As the courts below correctly determined, petitioner is precluded from pursuing her discrimination claims against respondent under the common law doctrine of judicial estoppel. In the Tortious Interference Lawsuit, petitioner claimed that her termination from respondent was the result of tortious interference of the unrelated parties, and the court relied upon petitioner's sworn statements in the Tortious Interference Lawsuit that her "good" employment relationship with respondent was destroyed because of the tortious interference of third parties.

In this lawsuit, petitioner took the inconsistent position that she was terminated because of her sex and because respondent perceived her to be disabled. In support of her claims of discrimination, petitioner cited comments she attributed to her female supervisor (the sole

person responsible for deciding to terminate petitioner's employment) and comments made by others employed at respondent. The comments petitioner attributed to her female supervisor allegedly were made, with one exception, months before petitioner was terminated from respondent. The other comment allegedly was made during the meeting in which petitioner was informed her employment was being terminated. Almost all of the comments petitioner attributes to other management employees at respondent in support of her discrimination claims also allegedly were made prior to petitioner's termination. All of these alleged comments were made prior to petitioner's testimony in the Tortious Interference Lawsuit that her relationship with respondent was good until the third parties interfered.

In the courts below, petitioner argued that these comments pre-dating her termination are direct evidence of discriminatory animus, for which no inference is necessary in order to conclude they demonstrate a discriminatory animus. According to petitioner's own allegations, she was well aware of the alleged discriminatory animus long before she filed either the Tortious Interference Lawsuit or this lawsuit. Therefore, the courts below properly held that, because petitioner's factual assertions and position in the Tortious Interference Lawsuit were relied upon by the court in the Tortious Interference Lawsuit, her contradictory factual assertions and position in this lawsuit were subject to the bar of judicial estoppel, and petitioner could not proceed with this case.

II. Petitioner's Attacks on the Decisions Below Are Without Merit.

Petitioner makes four arguments, all calculated to suggest that the courts below misapplied the relevant law and that, as a result, she has been unjustly deprived of the benefit of the anti-discrimination statutes at issue in this case. Each of petitioner's arguments fails because the courts below properly applied the law to this case and acted in conformity with the usual course of judicial proceedings.

A. The decisions below do not conflict with *Cleveland v. Policy Management Systems Corporation.*

Petitioner first argues that the determination that her claims against respondent were legally barred because of judicial estoppel is in conflict with this Court's opinion in *Cleveland v. Policy Management Systems Corporation,* 526 U.S. 795 (1999). Petitioner's assertions are incorrect, because the facts in her case are readily distinguished from those in *Cleveland.*

In *Cleveland,* this Court considered the limited question of whether an individual who has represented to the Social Security Administration ("SSA") that she is disabled and unable to work (and is then granted benefits under the Social Security Disability Insurance ("SSDI") program based upon that representation) is judicially estopped from bringing a lawsuit against her former employer under the Americans With Disabilities A ("ADA"). In an action under the ADA, the individual asserted that she could have performed the essential

functions of her job if the employer had provided her with reasonable accommodations. The Fifth Circuit Court of Appeals in *Cleveland* had held that an ADA plaintiff's representation to the Social Security Administration that she was totally disabled created a rebuttable presumption sufficient to judicially estop her later representation that "for the time in question," with reasonable accommodation, she could perform the essential functions of her job. *Id.* at 802. This Court disagreed, holding that in an application for SSDI, an individual is representing that he or she meets the SSA's technical definition of disabled, which requires a far simpler analysis than that required to determine whether an individual meets the ADA's more complex definition of a qualified individual with a disability. *Id.* at 803-4. Therefore, the two assertions (that the applicant for SSDI is totally disabled and that the ADA plaintiff could perform the essential functions of her job if provided reasonable accommodations) could in certain situations "comfortably exist side-by-side." *Id.* at 802-3.

This Court did not hold in *Cleveland* that an individual who stated on an application for SSDI that he or she was totally disabled could never be judicially estopped from later claiming that he or she was entitled to the protection of the ADA because he or she could perform the essential functions of his or her job. Rather, this Court disagreed with the Fifth Circuit Court of Appeals' holding that in such a case a judicial negative presumption should result, and therefore an individual who claimed to be totally disabled as defined by the SSA could not, as a matter of law, later bring a case under the ADA. *Id.* This Court, in fact, noted that there may well be circumstances

in which an individual who claimed to be totally disabled on an application for benefits to the SSA and who received such benefits could be judicially estopped from also bringing a case under the ADA. *Id.* at 805-6.

This Court explained that the particular statements at issue in *Cleveland* were not "directly conflicting statements about purely factual matters such as 'the light was red/green' or 'I can/cannot raise my arm above my head.' " *Id.* at 802. As this Court noted, a representation of total disability on an application for SSDI differs from a "purely factual statement" because it often implies a "context-related legal conclusion" that the applicant is "disabled for purposes of the Social Security Act." *Id.* In contrast to the *Cleveland* situation, petitioner's conflicting statements in the Tortious Interference Lawsuit and this lawsuit are purely factual statements implying no legal conclusions. In the Tortious Interference Lawsuit, petitioner stated that her employment relationship with respondent was good until third parties disparaged petitioner to respondent and asked respondent to terminate her. (Petition Appendix A at 34-35). These statements do not imply legal conclusions. They are assertions of fact, plain and simple.

In addition, the statements petitioner made in this case that contradict her prior sworn statements in the Tortious Interference Lawsuit do not imply legal conclusions. In this lawsuit petitioner swore that she was terminated by respondent because of her gender and/or because respondent perceived her to be disabled. These statements are factual assertions which petitioner supported with her own sworn testimony about comments she attributed to her supervisor and others at respondent

in her effort to show that she was terminated because she was a woman and/or because she was perceived to be disabled.

Petitioner argues that, just as in *Cleveland* where this Court noted that a claim of total disability under the SSA's definition and a claim that an individual could perform the essential functions of her job could co-exist, multiple reasons for petitioner's termination from respondent could also co-exist. That hypothetical situation did not occur in either of petitioner's cases. While it is true that multiple reasons could exist for petitioner's termination from respondent, petitioner overlooks the fact that she chose to pursue two completely separate remedies for the same harm at the same time by swearing to facts that were diametrically opposed.

Petitioner's claims in the Tortious Interference Lawsuit are contradictory to her claims in this lawsuit. In the Tortious Interference Lawsuit, petitioner swore that her relationship with respondent was entirely positive until third parties interfered, disparaged her, and sought to have respondent terminate her. In this lawsuit, petitioner reversed her position and swore that her relationship with respondent had been marred by discriminatory animus (of which she claims she was aware) since 1993. These two positions cannot be reconciled. Either her relationship with respondent was entirely positive until third parties interfered and brought about her termination, or she was subjected to discriminatory treatment (and actually aware of the discriminatory animus) for a number of years prior to her termination. These two fact patterns cannot co-exist and could not have been presented to a jury together. Therefore, petitioner filed two separate

lawsuits in order to pursue recoveries under two irreconcilable factual theories, which the Fifth Circuit properly held was legally barred by judicial estoppel.

B. The decisions below do not conflict with *Price Waterhouse v. Hopkins*.

Petitioner next argues that the Fifth Circuit's decision somehow suggests that an individual's termination cannot be caused by more than one factor, and therefore conflicts with this Court's plurality opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Fifth Circuit did not hold that petitioner could not allege that more than one factor lead to her termination from respondent, as petitioner claims. Rather, the Fifth Circuit held that petitioner could not take two inconsistent positions with regard to the circumstances of her employment and termination. Petitioner had testified at her deposition in the Tortious Interference Lawsuit in response to the question "Why were you terminated from [respondent]" that "I was terminated because . . . [a third party] tort[i]ously interfered with my employment contract." (Petition Appendix A at 35). Petitioner later testified in her deposition in this lawsuit in response to the identical question, "I was terminated from [respondent] because of my sex; Female; that women weren't given the opportunity to be successful at [respondent] that men would be; and that because of the fact that I was considered damaged goods or handicapped and unable to provide value to the company." (Petition Appendix A at 37).

The Fifth Circuit agreed with petitioner that she was not required to prove that either tortious interference or

discrimination was the sole cause of discharge. (Petition Appendix A at 37). Rather, the Fifth Circuit explained that it would not accept petitioner's attempt to reconcile the inherent inconsistencies in her positions in the two different lawsuits, rejecting her explanation that she was never asked for the "sole" reason for her termination. The Fifth Circuit held that petitioner gave "glaringly inconsistent, all-encompassing, non-qualified" responses in each case to the identical question about the reason for her termination. (Petition Appendix A at 38). The fact that the word "sole" was never used did not convince the Fifth Circuit that petitioner's contradictory testimony was excused because petitioner was asked open-ended questions. (Petition Appendix A at 38). Petitioner's employment relationship with respondent could not be good, as she claimed in the Tortious Interference Lawsuit, and riddled with discrimination for years, as she claimed in this lawsuit. The two factual situations described by petitioner could not exist side-by-side. The Fifth Circuit did not hold that a party could never allege that the two reasons stated could both be cause for termination, but rather that petitioner's use of two separate lawsuits to pursue these two separate recoveries, and failure to qualify her positions as potentially including other reasons for termination, were precisely the types of inconsistent positions judicial estoppel is intended to prevent, in order to preserve the integrity of the courts.

Neither this Court's holding in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), nor the Fifth Circuit's holding create a double standard, as alleged by petitioner. If an employer were to attempt to advance two irreconcilable reasons for an employee's termination in to

separate lawsuits, judicial estoppel would be appropriate. This Court has never held that an employer "can literally lie to the judge and jury about the true motives for a discharge, without necessarily suffering an adverse ruling" as petitioner claims. (Petition at 9). *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 508-11 (1993). Rather, as this Court recently clarified in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), a plaintiff may actually, in certain circumstances, avoid judgment as a matter of law if an employer's proffered reason for termination is proven false. As the Fifth Circuit correctly held, petitioner's case against respondent was barred because she had previously testified to facts that were inconsistent with the discrimination claims she tried to bring in this case. The Fifth Circuit never held that petitioner would have been precluded from claiming that there were multiple reasons for her termination.

C. The decisions below are consistent with other judicial estoppel cases.

Petitioner next argues that the Fifth Circuit's opinion is in conflict with two specific cases which did not involve the doctrine of judicial estoppel. In the first case, the Fifth Circuit addressed whether pleadings filed in one lawsuit were admissible at the trial of a later lawsuit because they were inconsistent with the assertions in the later lawsuit. *Mitchell v. Fruehauf Corp.*, 568 F.3d 1139 (5th Cir. 1978). In *Mitchell*, a driver injured in an automobile accident first sued the other driver and the owner of the other vehicle for negligence, and then later brought a lawsuit against the manufacturer of the other vehicles alleging that a design defect caused the accident. *Id.* at

1141, 1147. The Fifth Circuit held that the two positions held by the plaintiff – that negligent driving and maintenance caused the accident, and that a design defect caused the accident – were not inconsistent because unforeseeable misuse, not negligence, is a defense to a claim based on product liability. *Id.* at 1147.

In *Spinosa v. International Harvester Company*, the First Circuit also held that a negligence claim against one defendant was not inconsistent with a product liability claim against a different defendant. 621 F.2d 1154, 1157 (1st Cir. 1980). In both cases petitioner cites, of course, there is no discussion of factual assertions that cannot be reconciled. Rather, the courts were considering whether there could be multiple causes for an automobile accident. In this case, the question before the Fifth Circuit was never whether there could be multiple causes for petitioner's termination (no one disputes that it is possible for more than one reason to be the cause of a termination), but whether the facts she asserted in the Tortious Interference Lawsuit – that her employment relationship with respondent was good until third parties interfered – were consistent with her factual assertions in this lawsuit that for years she had been told she was the subject of discriminatory animus and that she indeed was the subject of discriminatory animus.

D. The decisions below did not depart from the usual course of judicial proceedings.

The Fifth Circuit and district court did not depart from the usual course of judicial proceedings when they held that petitioner was legally barred from bringing this

lawsuit because of the position she took in the Tortious Interference Lawsuit. Petitioner took positions in the two lawsuits that could not be reconciled. By repeatedly testifying under oath that her relationship with respondent was good until third parties interfered, and then asserting under oath in this lawsuit that she was told for years that she was being discriminated against (petitioner refers to this as "compelling direct evidence that [respondent] discriminated against [petitioner] because of both her sex and her perceived disability"), petitioner proffered facts that were wholly inconsistent. (Petition at 14 n. 4).

It is the unique factual assertions made by petitioner that caused the Fifth Circuit to hold that petitioner's discrimination claims are barred by judicial estoppel. This holding is consistent with this Court's holding in *Cleveland,* because petitioner's conflicting factual assertions are not legal conclusions. While it is a mixture of factual assertion and legal conclusion to state "I am disabled for purposes of the Social Security Act" or "I could perform the essential functions of the job with reasonable accommodation," it is purely factual to say "I was terminated because somebody interfered" or "I was terminated because of my sex." Therefore, the Fifth Circuit's holding that petitioner's discrimination claims are legally barred by the doctrine of judicial estoppel is consistent with the appropriate precedent and does not warrant review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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